

A Moscow Narodny Bank Ltd v Ngan Ching Wen

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 03-1 OF 2003(W)
STEVE SHIM CJ (SABAH & SARAWAK), ABDUL MALEK AHMAD AND
ABDUL HAMID MOHAMAD FCJJ

B 1 APRIL 2004

Bankruptcy — Notice — Interest arrears due on judgment debt included in bankruptcy notice — Bankruptcy notice issued within six years from date of judgment — Interest claimed included pre-judgment interest — Whether time-barred — Whether date when interest became due under judgment was date of judgment or date of commencement of interest — Limitation Act 1953 s 6(3)

C

Bankruptcy — Practice and procedure — Petition — Whether acceptance of part-payment by judgment creditor in course of bankruptcy proceedings rendered proceedings an abuse of process

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Limitation — Enforcement of judgment — Bankruptcy notice issued — Bankruptcy notice issued within six years from date of judgment — Interest claimed included pre-judgment interest — Whether time-barred — Whether date when interest became due under judgment was date of judgment or date of commencement of interest — Limitation Act 1953 s 6(3)

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The appellant obtained a judgment against the respondent on 19 November 1987. On 4 January 1992, the bankruptcy notice was issued. The respondent did not pay the sum demanded in the bankruptcy notice within the stipulated time. Thereafter, the appellant presented a creditor's petition against the respondent for failure to comply with the bankruptcy notice.

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On 11 November 1993, the respondent made a further part-payment of RM504,816.20 (equivalent to US\$200,000) to the appellant. Subsequently, the respondent filed a notice of intention to oppose petition on the ground that there had been a complete accord and satisfaction of the debt owed to appellant by his payment of RM504,816.20 (equivalent to US\$200,000). The appellant denied that there was accord and satisfaction of the debt.

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The senior assistant registrar dismissed the petition with costs. Appeal to the judge in chambers was also dismissed with costs. The Court of Appeal dismissed the appeal with a slight variation to the judge's order. On 7 July 2003, this court granted leave to the appellant for the determination of two issues, namely:

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(a) whether for the purpose of interpretation of the provisions of the second limb to s 6(3) of the Limitation Act 1953 ('the Act'), the date when interest became due under a judgment was to be taken as the date of judgment or the date of commencement of interest as stipulated in the judgment; (b) whether acceptance of part-payment by a judgment creditor in the course of bankruptcy proceedings would render the proceedings an abuse of process despite indication

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by the judgment creditor that such payments would be paid over to the official assignee in the event the debtor was adjudicated bankrupt upon the creditor's petition by reason of the absence of full settlement of the judgment debt.

Held, allowing the appeal:

- (1) (per **Abdul Malek Ahmad FCJ**) In the *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2002] 2 MLJ 385 case, this court had decided that the date interest became due was the judgment date. Since this finding was already made in the *Ernest Chong*, the first question should not have been allowed (see para 12).
- (2) (per **Abdul Malek Ahmad FCJ**) In respect of the second question, the learned High Court judge found that no agreement was ever reached between the respondent and the appellant to treat the payment of US\$200,000 as a full and final settlement of the judgment debt. Before the Court of Appeal, the appellant's complaint was that the learned High Court judge had found for the respondent on the point of accord and satisfaction without sufficient investigation of the facts. The Court of Appeal agreed with the appellant and held that the trial judge ought not to have expressed any concluded view on this issue in the absence of cogent evidence. As can be seen from the High Court judge's judgment, it was not correct for the Court of Appeal to say that the learned High Court judge had found for the respondent on this point. In fact there was enough cogent evidence for the High Court judge to come to the conclusion that no agreement was ever reached between the respondent and the appellant to treat the payment of US\$200,000 as a full and final settlement of the judgment debt (see paras 14–16).
- (3) (per **Abdul Malek Ahmad FCJ**) The Court of Appeal went on further to say that the totality of the circumstances reasonably supported the inference that the appellant was using the bankruptcy court to extract payments from the respondent and that this amounted to an abuse of the bankruptcy jurisdiction of the High Court. Again, this cannot be correct as the learned High Court Judge had dismissed the appeal purely on the miscalculation of the interest in the bankruptcy notice and the creditor's petition (see paras 17 and 18).
- (4) (per **Abdul Malek Ahmad FCJ**) As for the issue of accord and satisfaction, there was no reason to disagree with the finding by the High Court that there was none despite the persistent claims of the respondent. It was always the respondent paying a certain sum of money to the appellant and asking that it be treated as a final settlement sum which was never agreed to by the appellant. Continuing with the bankruptcy proceedings despite the payments cannot, therefore, be held to be an act of oppression on the part of the appellant. The second question must therefore be answered in the negative (see para 41); *Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd* [1999] 4 MLJ 637 distinguished.
- (5) (per **Abdul Malek Ahmad FCJ**) Accordingly, receiving and adjudication orders were made against the respondent and all monies paid by the

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- A** respondent to the appellant were to be paid to the official assignee within two weeks of this order (see para 42).
- (6) (per **Abdul Hamid Mohamad FCJ**) Based on this court's judgment in *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2002] 2 MLJ 385, where the bankruptcy notice was issued within six years from the date of the judgment, the interest claimed was not time-barred even though it included pre-judgment interest. In other words, the material date was the date of the judgment and not the date of commencement of interest. So long as the bankruptcy notice was filed within six years from the date of the judgment, the appellant was entitled to claim interest as stipulated in the judgment even though the date of the commencement of the interest was earlier. Therefore, 'the date on which the interest became due' in the second limb to s 6(3) of the Act was the judgment date (see paras 54 and 55); *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2002] 2 MLJ 385 followed.
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- D** (7) (per **Abdul Hamid Mohamad FCJ**) Regarding the second question, the learned High Court judge had found that no agreement was ever reached between the respondent and the appellant to treat the payment of RM504,816.20 (equivalent to US\$200,000) as a full and final settlement of the judgment debt. In the Court of Appeal however, learned counsel for the appellant complained that the learned High Court judge found for the respondent on the point without sufficient investigation of facts. That argument found favour with the Court of Appeal. The question, as posed to this court, was not whether acceptance of part-payment nullified the bankruptcy notice and/or petition but rather, whether the receipt of the said payment by the appellant amounted to an abuse of the bankruptcy jurisdiction of the High Court or, what was usually called 'abuse of the process of the Court'. In any case, where after the filing of the creditor's petition, the amount owing by the debtor was reduced, the petition would not be bad as long as the amount remaining owing at the date of hearing of the petition was more than the statutory limit (see paras 57–61); *Re Patel (A debtor)* [1986] 1 All ER 522 followed; *Re Saloma Co; ex p Ipoh Radio Co* [1963] MLJ 46 distinguished.
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- (8) (per **Abdul Hamid Mohamad FCJ**) In considering the question of abuse of the process of court in bankruptcy proceedings, one must not lose sight of the reality in a debt recovery action. The intention of a creditor was to recover the debt in the most effective way. It was within a judgment creditor's right to prefer one method of realising a judgment debt over the other methods. So, strong evidence of *mala fide* on the part of judgment creditor was required to prove abuse of process of court in bankruptcy proceedings (see para 66).
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- I** (9) (per **Abdul Hamid Mohamad FCJ**) In the instant appeal, the only factor relied on by the respondent was that the appellant had accepted

the payment of US\$200,000 by the respondent. Even that payment, which the appellant insisted was a part-payment, was made after the commencement of the bankruptcy proceedings. There was no allegation that the appellant was using the bankruptcy proceedings as a means of obtaining payment of money to which the appellant was not entitled to or any evidence of fraud. The only ground put up by the respondent to oppose the petition was that there was an accord and satisfaction. The bankruptcy proceedings were filed by the appellant, as a judgment debtor, to recover the judgment debt owed to them. The fact that the respondent made the payment subsequent to the filing of the bankruptcy proceedings did not in any way tarnish the intention of the appellant in commencing the proceedings or even pursuing it as the appellant was of the view that it was only a part-payment of the judgment debt. Furthermore, the issue of abuse of process of the court was not raised by respondent in the High Court (see para 71).

- (10) (per **Abdul Hamid Mohamad FCJ**) Therefore, the second question was in the negative. Merely accepting payments in the course of bankruptcy proceedings did not render the proceedings an abuse of process, what more when the money was to be paid to the official assignee in the event the respondent was adjudicated bankrupt (see para 72).
- (11) (per **Abdul Hamid Mohamad FCJ**) Accordingly, the order of the Court of Appeal was set aside. As the two issues before this court were answered in favour of the appellant, receiving and adjudicating orders were accordingly made against the respondent and the sum of RM504,816.20 (equivalent to US\$200,000) paid by the respondent to the appellant and the interests earned thereon were to be paid to the official assignee within two weeks of this order (see para 73).

[Bahasa Malaysia summary]

Perayu memperoleh penghakiman terhadap responden pada 19 November 1987. Pada 4 Januari 1992, notis kebangkrapan telah dikeluarkan. Responden tidak membayar jumlah yang dituntut dalam notis kebangkrapan dalam tempoh yang ditetapkan. Oleh itu, perayu mengemukakan petisyen pemiutang terhadap responden kerana gagal mematuhi notis kebangkrapan tersebut.

Pada 11 November 1993, responden membuat sebahagian daripada bayaran selanjutnya berjumlah RM504,816.20 (bersamaan US\$200,000) kepada perayu. Berikutan itu, responden telah memfailkan satu notis berhasrat membangkang petisyen tersebut atas alasan hutang yang perlu dibayar kepada perayu telah diselesaikan dan dipenuhi melalui pembayaran beliau sebanyak RM504,816.20 (bersamaan US\$200,000). Perayu menafikan terdapat penyelesaian hutang tersebut.

- A** Penolong kanan pendaftar menolak petisyen tersebut dengan kos. Rayuan kepada hakim dalam kamar juga ditolak dengan kos. Mahkamah Rayuan menolak rayuan dengan sedikit perubahan kepada perintah hakim tersebut. Pada 7 Julai 2003, mahkamah ini memberikan kebenaran kepada perayu untuk menentukan dua persoalan, iaitu: (a) sama ada bagi tujuan pentafsiran peruntukan kepada cabang kedua s 6(3) Akta Had Masa 1953 ('Akta tersebut'), tarikh bila faedah perlu dibayar di bawah penghakiman dianggap sebagai tarikh penghakiman atau tarikh bermulanya faedah itu seperti ditetapkan dalam penghakiman; dan (b) sama ada penerimaan sebahagian bayaran oleh pemiutang penghakiman dalam proses prosiding kebangkrutan akan menyebabkan prosiding tersebut satu penyalahgunaan proses meskipun telah dinyatakan oleh pemiutang penghakiman bahawa bayaran tersebut akan dibuat kepada pegawai pemegang harta sekiranya penghutang dijadikan bankrap dengan petisyen pemiutang tersebut atas alasan tiada penyelesaian penuh dibuat untuk hutang penghakiman itu.
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- D** **Diputuskan**, membenarkan rayuan tersebut:
- (1) (oleh **Abdul Malek Ahmad HMP**) Dalam kes *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2002] 2 MLJ 385, mahkamah ini memutuskan bahawa tarikh faedah mula tertunggak adalah tarikh penghakiman. Memandangkan penemuan ini telah pun dibuat dalam *Ernest Chong*, persoalan pertama tidak patut dibenarkan (lihat perenggan 12).
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- (2) oleh **Abdul Malek Ahmad HMP**) Berkaitan persoalan kedua, hakim Mahkamah Tinggi yang bijaksana mendapati bahawa tiada persetujuan dicapai antara responden dan perayu untuk menganggap bayaran US\$200,000 sebagai penyelesaian penuh hutang penghakiman. Di hadapan Mahkamah Rayuan, aduan perayu adalah bahawa hakim Mahkamah Tinggi yang bijaksana memihak kepada responden berdasarkan persetujuan dan penyelesaian tanpa siasatan yang memadai terhadap fakta-fakta. Mahkamah Rayuan bersetuju dengan perayu dan memutuskan bahawa hakim perbicaraan tidak sepatutnya menyatakan apa-apa pendapat yang muktamad berhubung persoalan ini tanpa keterangan kukuh. Seperti yang dapat dilihat daripada penghakiman hakim Mahkamah Tinggi, adalah tidak betul untuk Mahkamah Rayuan mengatakan bahawa hakim Mahkamah Tinggi yang bijaksana memihak kepada responden berhubung perkara ini. Bahkan terdapat bukti kukuh untuk hakim Mahkamah Tinggi tiba kepada kesimpulan bahawa tiada persetujuan dicapai antara responden dan perayu untuk menganggap bayaran US\$200,000 sebagai penyelesaian penuh dan terakhir hutang penghakiman itu (lihat perenggan 14–16).
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- (3) (oleh **Abdul Malek Ahmad HMP**) Mahkamah Rayuan seterusnya mengatakan bahawa keseluruhan keadaan tersebut dengan munasabah menyokong inferens bahawa perayu menggunakan mahkamah kebangkrutan untuk mendapat bayaran daripada responden dan ini membentuk satu penyalahgunaan bidang kuasa kebangkrutan Mahkamah Tinggi. Sekali lagi,
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ini tidak betul kerana hakim Mahkamah Tinggi telah menolak rayuan tersebut semata-mata berdasarkan pengiraan salah faedah dalam notis kebangkrutan dan petisyen pemiutang (lihat perenggan 17 dan 18).

- (4) (oleh **Abdul Malek Ahmad HMP**) Berhubung persoalan persetujuan dan penyelesaian, tiada alasan untuk tidak bersetuju dengan penemuan Mahkamah Tinggi bahawa tidak terdapat apa-apa persetujuan dan penyelesaian meskipun dituntut sedemikian oleh responden. Responden sentiasa membayar sejumlah wang tertentu kepada perayu dan meminta bahawa ia dianggap sebagai jumlah penyelesaian terakhir yang tidak pernah dipersetujui oleh perayu. Dengan meneruskan prosiding kebangkrutan meskipun terdapat pembayaran tidak boleh, oleh demikian, diputuskan sebagai satu tindakan yang menindas di pihak perayu. Persoalan kedua hendaklah dijawab secara negatif (lihat perenggan 41); *Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd* [1999] 4 MLJ 637 dibeza.
- (5) (oleh **Abdul Malek Ahmad HMP**) Sewajarnya, perintah-perintah penerimaan dan pengadilan dibuat terhadap responden dan kesemua wang yang telah dibayar oleh responden kepada perayu hendaklah dibayar kepada pegawai pemegang harta dalam tempoh dua minggu daripada perintah ini (lihat perenggan 42).
- (6) (oleh **Abdul Hamid Mohamad HMP**) Berdasarkan penghakiman mahkamah dalam *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2002] 2 MLJ 385, di mana notis kebangkrutan dikeluarkan dalam tempoh enam tahun daripada tarikh penghakiman, faedah yang dituntut tidak terbatas oleh had masa walaupun ia termasuk faedah pra penghakiman. Dalam erti kata lain, tarikh penting adalah tarikh penghakiman dan bukan tarikh bermulanya faedah itu. Selagi notis kebangkrutan difailkan dalam tempoh enam tahun daripada tarikh penghakiman, perayu berhak untuk menuntut faedah seperti ditetapkan dalam penghakiman meskipun tarikh bermulanya faedah tersebut adalah lebih awal. Oleh itu, 'the date on which the interest became due' dalam cabang kedua kepada s 6(3) Akta tersebut adalah tarikh penghakiman (lihat perenggan 54 dan 55); *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2002] 2 MLJ 385 diikuti.
- (7) (oleh **Abdul Hamid Mohamad HMP**) Berhubung persoalan kedua, hakim Mahkamah Tinggi yang bijaksana mendapati bahawa tiada persetujuan dicapai antara responden dan perayu supaya menganggap bayaran RM504,816.20 (bersamaan US\$200,000) sebagai penyelesaian penuh dan terakhir hutang penghakiman. Di Mahkamah Rayuan bagaimanapun, peguam bijaksana bagi pihak perayu mengadu bahawa hakim Mahkamah Tinggi memihak kepada responden berhubung perkara ini tanpa siasatan fakta yang mencukupi. Hujah tersebut juga dipersetujui oleh Mahkamah Rayuan. Persoalannya, seperti diutarakan ke mahkamah ini, bukanlah sama ada penerimaan sebahagian daripada bayaran membatalkan notis

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- A** kebangkrapan dan/atau petisyen tersebut tetapi lebih kepada, sama ada penerimaan bayaran tersebut oleh perayu membentuk satu penyalahgunaan bidang kuasa kebangkrapan Mahkamah Tinggi atau, apa yang biasanya dipanggil 'abuse of the process of the court'. Dalam apa keadaan pun, di mana selepas pemfailan petisyen pemiutang, jumlah yang perlu dibayar oleh penghutang dikurangkan, petisyen itu tidak cacat selagi jumlah yang masih perlu dibayar pada tarikh perbicaraan petisyen itu lebih daripada had statutori (lihat perenggan 57–61); *Re Patel (A debtor)* [1986] 1 All ER 522 diikuti; *Re Saloma Co; ex p Ipoh Radio Co* [1963] 29 MLJ 46 dibeza.
- B**
- C** (8) (oleh **Abdul Hamid Mohamad HMP**) Dalam menimbangkan persoalan penyalahgunaan proses mahkamah dalam prosiding kebangkrapan, seseorang itu tidak seharusnya lari daripada realiti dalam satu tindakan mendapat balik hutang. Niat pemiutang adalah untuk mendapat balik hutang dalam cara yang paling berkesan. Adalah hak pemiutang penghakiman untuk memilih satu cara untuk merealisasikan hutang penghakiman berbanding dengan cara-cara lain. Oleh itu, keterangan nyata *mala fide* dipihak pemiutang penghakiman diperlukan untuk membuktikan penyalahgunaan proses mahkamah dalam prosiding kebangkrapan (lihat perenggan 66).
- D**
- (9) (oleh **Abdul Hamid Mohamad HMP**) Dalam rayuan semasa, satu-satunya fakta yang responden bergantung kepada adalah bahawa perayu telah menerima bayaran US\$200,000 oleh responden. Bayaran tersebut, yang perayu dengan tegas mengatakan adalah satu sebahagian daripada bayaran, dibuat selepas bermulanya prosiding kebangkrapan. Tiada pengatahan yang perayu menggunakan prosiding kebangkrapan sebagai cara mendapatkan bayaran wang yang perayu tiada hak ke atasnya atau apa-apa bukti fraud.
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- F** Satu-satunya alasan yang diutarakan oleh responden untuk membangkang petisyen tersebut adalah bahawa terdapat persetujuan dan penyelesaian. Prosiding kebangkrapan telah difailkan oleh perayu, sebagai penghutang penghakiman, untuk mendapat balik hutang penghakiman yang perlu dibayar oleh mereka. Hakikat yang responden membuat bayaran berikutan pemfailan prosiding kebangkrapan itu tidak dalam apa cara pun menjejaskan niat perayu dalam memulakan prosiding ataupun meneruskannya kerana perayu berpendapat ia hanya sebahagian daripada bayaran hutang penghakiman. Tambahan pula, persoalan penyalahgunaan proses mahkamah tidak ditimbulkan oleh responden dalam Mahkamah Tinggi (lihat perenggan 71).
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- H** (10) (oleh **Abdul Hamid Mohamad HMP**) Oleh itu, persoalan kedua adalah negatif. Hanya dengan menerima bayaran semasa prosiding kebangkrapan tidak menyebabkan prosiding tersebut satu penyalahgunaan proses, apa lagi bila wang yang perlu dibayar adalah kepada pegawai pemegang harta sekiranya responden dijadikan bankrap (lihat perenggan 72).
- I** (11) (oleh **Abdul Hamid Mohamad HMP**) Sewajarnya, perintah Mahkamah Rayuan diketepikan. Memandangkan dua persoalan di hadapan mahkamah

ini dijawab memihak kepada perayu, perintah-perintah penerimaan dan pengadilan dibuat terhadap responden dan jumlah RM504,816.20 (bersamaan US\$200,000) dibayar oleh responden kepada perayu dan faedah yang diperoleh dibayar kepada pegawai pemegang harta dalam tempoh dua minggu daripada perintah ini (lihat perenggan 73).]

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Notes

For a case on interest arrears due on judgment debt included in bankruptcy notice, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) para 2227.

For cases on petition, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2507–2508.

C

For a case on bankruptcy notice issued, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) para 2197.

Cases referred to

D

A Debtor (No 1838 of 1911), Re [1912] 1 KB 53 (refd)

A Debtor (No 305 of 1911), Re [1911] 2 KB 718 (refd)

A Debtor (No 757 of 1954), Re; The Debtor v FA Dumont Ltd [1955] CA 65 (refd)

A Debtor (No 757 of 1954), Re; The Editor v RA Damont Ltd [1955] 2 All ER 65 (refd)

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Chong Ah Kwan Construction Co, Re [1966] 2 MLJ 39 (refd)

Darshan Singh a/l Atma Singh, Re; ex p OCBC Bank (Malaysia) Bhd [1996] MLJU 1195 (refd)

Fong Yuan Kwong, Re; ex p Public Bank Bhd [1996] 4 MLJ 42 (refd)

Fredericke and Whitworth, Re; ex p Hibbard [1927] 1 Ch 253 (refd)

Hussain bin Manaf, Dalam Perkara; ex p Malayan Banking Bhd [2001] MLJU 781 (refd)

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Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd [1999] 4 MLJ 637 (distd)

Loh Kok Huah Re; ex p Ban Hin Lee Bank Bhd [1992] 1 MLJ 687 (refd)

Majory, Re [1955] Ch 600 (refd)

Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia [1999] 2 MLJ 337 (refd)

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MSA Zachariah, ex p Boon Siew Finance Bhd, Re [1993] 3 CLJ 279 (refd)

Patel, Re (A debtor) [1986] 1 All ER 522 (refd)

Rozenbes & Ors v Kronhill & Anor (1956) 95 CLR 407 (refd)

Rozila bte Mohamed v American Express (M) Sdn Bhd [1999] MLJU 959 (refd)

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Sababumi (Sandakan) Sdn Bhd v Dato Yap Pak Leong [1998] 3 MLJ 151 (refd)

Saloma Co, Re; ex p Ipoh Radio Co [1963] 29 MLJ 46 (distd)

Sharifah Mohsin, Re [1994] 3 CLJ 373 (refd)

Tara Chand v Jugal Kishore (1924) 83 Indian Cases 967 (refd)

Thomas v Marconi's Telegraph Co Ltd [1965] 2 All ER 598 (refd)

Ti Hock Soon, Re [1993] 1 CLJ 477 (refd)

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United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin [2002] 2 MLJ 385 (folld)

A Legislation referred to

Bankruptcy Act 1883 [UK] s 4 (1)(g)
Courts of Judicature Act 1964 s 25(2)
Limitation Act 1953 s 6(3)
Rules of the Federal Court 1995 rr 47(4), 57(1), 57(2)

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Appeal from: Civil Appeal No W-03-6 of 1996 (Court of Appeal, Kuala Lumpur)

Leong Wai Hong (Claudia Cheah with him) (Skrine & Co) for the appellant.

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Hj Sulaiman Abdullah (KK Yeow and Thaiyub Khan with him) (Thaiyub Khan Othuman & Co) for the respondent.

Abdul Malek Ahmad FCJ:

D [1] Judgment for the sum of RM5,513,468.61 had been entered against the respondent on 19 November 1987 and the bankruptcy notice dated 4 June 1992 was duly served on the respondent on 3 November 1992. The creditor's petition was served on the respondent on 1 September 1993. Notice to oppose the creditor's petition filed on 23 May 1994 was served on the appellant on 2 June 1994.

E [2] On 23 June 1995, the learned senior assistant registrar dismissed the creditor's petition with costs. Since there were no grounds of judgment by the learned senior assistant registrar, the learned High Court judge proceeded to hear the appeal as if it were a retrial. The appeal to the judge in chambers was dismissed with costs on 20 December 1995, mainly because the creditor's petition had lumped the principal amount with accumulated interest for more than six years calculated backwards from the date the bankruptcy notice was dated.

F [3] This is evident from what was stated by the learned High Court judge at p 17 of his judgment:

G But since the interest item has formed an integral part of the total amount, inseparable from the principal sum as well as other subsequent claim (sic) on interest not affected by the Limitation Act due to the nature of a running account as stated in the particulars as set out in the banks (sic) notice and the petition, the entire claim of the petitioning creditors as stated in the bankruptcy notice and petition is therefore unenforceable.

H [4] Subsequently, the appeal to the Court of Appeal was dismissed on 20 July 1999 with no order as to costs. However, the grounds of judgment of the Court of Appeal only became available on 1 October 2001.

I [5] On 7 July 2003, the court granted the appellant leave to appeal on the following two questions:

- (a) whether for the purposes of interpretation of the provisions of the second limb to s 6(3) of the Limitation Act 1953 the date when interest became due under a judgment is to be taken as

the date of judgment, or the date of commencement of interest as stipulated in the judgment;

- (b) whether acceptance of part payment by a judgment creditor in the course of bankruptcy proceedings renders the proceedings as abuse of process despite indication by the judgment creditor that such payments would be paid over to the official assignee in the event the debtor is adjudicated bankrupt upon the creditors petition by reason of the absence of full settlement of the judgment debt.

[6] On 28 October 2003, the respondent filed a motion asking for the appeal to be dismissed pursuant to the inherent jurisdiction of this court or alternatively pursuant to para 11 of the Schedule to, read with s 25(2) of the Courts of Judicature Act 1964 (hereinafter 'the CJA'), or alternatively for the appeal to be permanently stayed, with costs on the ground that the appellant had filed a fresh bankruptcy notice on the respondent on 16 November 1999 which, on the respondent's application, was set aside by the learned senior assistant registrar on 12 October 2000. At the time of hearing of this appeal, the appeal to the judge in chambers against that order of the learned senior assistant registrar was still pending. It is the contention of the respondent that there has been a multiplicity of proceedings as both bankruptcy proceedings are founded on the same judgment.

[7] The supporting affidavit also alleges that the bankruptcy notice the second time around was not in accordance with the judgment because the appellant is a Singapore based company with no place of business in Malaysia, the appellant cannot be carrying on a business within the premises of the appellant's solicitors, and that nowhere is it stated in the bankruptcy notice that the appellant's solicitors had authority to receive payment and to issue a receipt and discharge on the appellant's behalf.

[8] We decided to hear the appeal and motion together.

[9] As for the first question, it appears to be different from the question posed at the leave stage in the earlier case of *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2002] 2 MLJ 385 dated 5 April 2002. The question then was:

What was the proper construction of s 6(3) of the Limitation Act 1953 ('the Act'), in respect of the second limb, that is, 'No arrears of interest of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due'?

[10] Writing the judgment for the court in that case, I had said at p 397 of the report that:

Having studied *Lowsley & Anor v Forbes (t/a LE Design Services)* [1998] 3 All ER 897 case carefully, we are persuaded to review the finding in the *Malaysian Soil's* case as

- A** regards the maximum period arrears of interest can be claimed. It was decided then that the interest can go on for more than six years from the judgment date but having reconsidered the matter in the light of *Lowsley's* case and the word 'arrears', it is now our opinion that when the act of recovery is made, future interest cannot be said to be in arrear and, therefore, cannot be claimed. The decision in the *Malaysia Soil's* case would have been correct if the words used were 'no interest' and not 'no arrears of interest'.
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On these considerations, we would hold that it is obvious that the second limb of s 6(3) of the Act provides that an action to recover arrears of interest must be brought within six years of the judgment date and because of the word 'arrears', it cannot denote interest which is still not due. It must, therefore, mean arrears of interest at the time of recovery and cannot include future interest even if the amount due has not been paid. We would, therefore, agree with the finding in *Lowsley's* case.

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Thus, a person filing an action for recovery of arrears of interest on the last day of the six year period from the judgment date is only entitled to that amount and nothing more. If he files it on the first day after the six year period, his action is barred by limitation, arrears of interest included.

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[11] When this matter came up at the leave stage on 7 July 2003, which was some fourteen months later, I was again on the panel but the question was phrased in such a different way that I personally felt it was a different problem. The first question posed in this appeal seeks to ask when is the date the interest becomes due. Is it the judgment date or the date of commencement of interest as stipulated in the judgment? In the *Ernest Chong* appeal, the emphasis was on the non recovery of arrears of interest after six years from the date on which the interest became due.

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F **[12]** Upon full analysis at the hearing of this appeal, I now realise that maybe the question should not have been allowed as in deciding the question in the *Ernest Chong* appeal, this court had to decide when is the date the interest becomes due. It was accordingly decided that it was the judgment date. In fact, the way the question was worded here, with the words 'to be taken as', suggests as a first alternative that the date the interest became due under a judgment becomes the date of judgment. This was in fact the finding already made in the *Ernest Chong* appeal.

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H **[13]** The second question pertains to the acceptance of part payment by the judgment creditor in the course of bankruptcy proceedings and whether it renders the proceedings an abuse of process. But before we answer that, it is relevant to consider the issue of accord and satisfaction first.

[14] The judgment of the learned High Court judge on this point states at p 13:

I After perusing the documentary evidence annexed to the respective affidavits of the parties, this court finds no agreement was ever reached between the debtor and the petitioning creditors to treat the payment of US\$200,000 as a full and final

settlement of the judgment debt. The debtor's offer was never accepted by the petitioning creditors prior to the debtor making the payment of US\$200,000. If the petitioning creditor had agreed to accept such an offer of the debtor previously, the debtor would not have ended his same letter of offer with a request to the petitioning creditor for; 'Please confirm by fax the aforesaid arrangement is agreeable to you.' Such a request was not necessary if an agreement had been reached, and such an act can only imply otherwise especially when the petitioning creditor never responded to this request.

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Following from the above, the debtor on the 21 February 1994 made another offer of US\$350,000 in full and final settlement of the judgment sum. This again is obvious to indicate that his previous offer was not received with agreement from the petitioning creditor, otherwise, if it had, there was no necessity to tender this second offer.

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[15] The Court of Appeal, however, had a different view. It said:

There remains one further matter. The sole ground on which the respondent resisted the petition was that there had been a complete accord and satisfaction of the debt on which the bankruptcy proceedings were based. The appellant complains that the learned judge found for the respondent on the point without sufficient investigation of the facts. I think that there is much force in this argument. There may or may not have been an accord and satisfaction as alleged by the respondent. It is an issue that called for resolution in other proceedings properly brought by the respondent. The judge ought not, in my view, have expressed any concluded view on this issue in the absence of cogent evidence.

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[16] It is certainly not correct for the Court of Appeal to say that the learned High Court judge found for the respondent on the point as can be seen by the finding of the learned High Court judge in the preceding paragraph. In any case, there was enough cogent evidence from the correspondence for the High Court judge to come to that conclusion.

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[17] The Court of Appeal then went on to say:

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However, in the state of the evidence before him, the learned judge would have been perfectly entitled to dismiss the petition on the ground that it was an abuse of process. The appellant's own evidence warranted this. It is clear that the appellant had accepted payments from the respondent after commencing bankruptcy proceedings. The totality of the circumstances reasonably supports the inference that the appellant was using the bankruptcy court to extract payments from the respondent. That in my judgment amounts to an abuse of the bankruptcy jurisdiction of the High Court. The bankruptcy jurisdiction of the High Court is invoked on the ground that a debtor has committed an act of bankruptcy. The object of the exercise is to take the debtors financial affairs out of his hands and place them in the hands of the official assignee. It is certainly an abuse of process to use bankruptcy proceedings in the way of a judgment debtor summons to extract periodical payments from the debtor.

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A [18] Again, this cannot be correct as the learned High Court judge had dismissed the appeal purely on the miscalculation of the interest in the bankruptcy notice and the creditor's petition.

[19] The Court of Appeal made a further error when it said:

B In my judgment, the learned judge's decision is entirely correct and is supportable on the additional ground that I have adverted to a moment ago. It is true that the appellant is prejudiced by the finding made by the learned judge that there had been a complete settlement. But that is easily remedied by setting aside that part of the judgment and granting the parties liberty to institute appropriate proceedings to have that issue determined.

C [20] It is obvious, as seen earlier, the learned High Court judge never made a finding that there had been a complete settlement.

D [21] The Court of Appeal relied on *Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd* [1999] 4 MLJ 637 where the facts are quite distinguishable being a housing development contract and not one relating to bankruptcy proceedings. In any case, on the facts presented in this case, I would agree with the learned High Court judge as I cannot find any evidence that there was any accord or satisfaction or any attempt by the appellant to extract the debt payment from the respondent apart from the filing of the bankruptcy notice and the creditor's petition.

E [22] The following authorities certainly support this contention.

[23] In *Re A debtor (No 757 of 1954)*; *The Debtor v FA Dumont Ltd* [1955] CA Vol 2 65 had propounded the following propositions:

- F** (a) there is no hard and fast rule that any arrangement or agreement made by a petitioning creditor with his debtor, after the institution or under the shadow of bankruptcy proceedings, whereby the creditor is able to get more than that 'to which he was legally entitled' (that is, more than he could have recovered at law at the time of the bankruptcy proceedings being started or threatened) amounts to extortion in bankruptcy law, notwithstanding the absence of any mala fides or anything amounting to oppression in fact;
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- (b) there is equally no rule that extortion has, in bankruptcy law, a special and artificial significance divorced altogether from the ordinary implication of the word;
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- (c) the so-called 'rule' in bankruptcy is no more than an application of a more general rule that court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and, therefore, disqualified from invoking the powers of the court by proceedings which he had abused;
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- (d) on the other hand the court will always look strictly at the conduct of a creditor using or threatening bankruptcy proceedings; and, if the court concludes that the creditor has used or threatened the proceedings at all oppressively (for example in order to obtain some payment or promise from the debtor or some other collateral advantage to himself properly attributable to the use of the threat), the court will not hesitate to declare the creditor's conduct extortionate and will not allow him to make use of the process which he has abused;
- (e) in every case it is a question of fact in all the circumstances of the case whether there has been, in truth, extortion.

[24] In *Tara Chand v Jugal Kishore* (1924) 83 Indian Cases 967, the court ruled that the mere fact that payments have been made to the creditors of an insolvent between the filing of the petition for insolvency and the hearing, is not a ground for dismissing the petition. In *Re Loh Kok Huah, ex p Ban Hin Lee Bank Bhd* [1992] 1 MLJ 68, it was held that even where the judgment debt on which the creditor's petition was founded had by the date of hearing of the petition been substantially reduced, the court could still make a receiving order unless the judgment debt was less than the statutory minimum. This was followed in *Re Fong Yuan Kwong, ex p Public Bank Bhd* [1996] 4 MLJ 42.

[25] In *Rozenbes & Ors v Kronhill* (1956) 95 CLR 407, it was decided that there is an abuse of process if a pending bankruptcy petition or a threat of proceedings in bankruptcy is used as a means of extortion. The court will look strictly at the conduct of a creditor using or threatening bankruptcy proceedings and extortion may be held to have taken place if the creditor has used, or attempted to use, a pending petition, or threat of a petition, in order to extract from the debtor money which the debtor is not bound to pay or in order to obtain some secret and unfair advantage over other creditors. But extortion will not be held to have taken place 'in the absence of *mala fides* or anything amounting to oppression in fact'. There must be a real intention on the part of the creditor to use the process for some other end than its legitimate end and there must be a real exertion of pressure.

[26] In fact, in *Re Fredericke and Whitworth; ex p Hibbard* [1927] 1 Ch 253, it was held that a creditor who has served a bankruptcy notice which has not been complied with is not precluded from issuing and serving a second notice in respect of the same debt and the existence of an available act of bankruptcy does not excuse the debtor from compliance therewith.

[27] Learned counsel for the respondent argued that bankruptcy is the most tedious consequence of civil law and the courts have taken the hardest line possible as regards the technical requirements from the bankruptcy court to the appellate levels. Accordingly, he stressed, no argument can be dismissed as being too technical.

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- A** [28] He then referred to the relevant orders where the interest rate is given as nine and a half per cent but the bankruptcy notice states ninety two per cent. Furthermore, the respondent had been asked to pay at the appellant's solicitors' firm.
- B** [29] At this juncture, learned counsel for the appellant interrupted to say that this was not a reply and was not the submission made at all previous levels. In any case, he said, it was prejudicial to the appellant as it should have been done at the leave stage.
- C** [30] Learned counsel for the respondent explained that he was merely laying the groundwork to submit on the oppression and referred to paras 9, 10, 11 and 12 of the supporting affidavit to the motion filed which are reproduced here for effect:
- D** 9 I am further advised by my solicitors and verily believe that based upon the current bankruptcy law and civil procedure, it is wrong for the appellant to initiate two simultaneous bankruptcy proceedings against me, both of which are founded upon a single judgment.
- E** 10 The bankruptcy proceedings vide Bankruptcy No D4–29–3629 of 1992 and Bankruptcy No D4–29–4384 of 1999, both prosecuted simultaneously, have occasioned a 'multiplicity of proceedings'. By reason thereof, the appeal herein is an abuse of the court process and is also vexatious and oppressive.
- F** 11 I am advised by my solicitors and verily believe that to pursue both this appeal and the proceedings arising out of the second notice renders the motive of the appellant suspect. The motive is to embarrass me and such conduct is oppressive.
- G** 12 I further aver that apart from the appeal herein, there are two (2) other matters vide Suit No D4–(D8)–22–234 of 2001 in the High Court at Kuala Lumpur, where summary judgment for USD5,162,837.32 was entered on 1 August 2000. An appeal is now being filed in the Court of Appeal. The second matter is in the Court of Appeal No W–02–1094- of 2001, where a judgment for S\$1,555,842.46 was registered in the High Court at Kuala Lumpur against me, which resulted in the appeal to the Court of Appeal. Ms Skrine are the solicitors acting for the plaintiff/respondent in both these matters.
- H** [31] He cited *Re A Debtor (No 305 of 1911)* [1911] 2 KB 718 where it was decided that a bankruptcy notice which requires the debtor to pay the judgment debt to the judgment creditors 'or their solicitors' and which contains a statement by the solicitors that they are authorised by the creditors to receive payment and to act for them in respect of all matters specified in the notice, is not a bankruptcy notice 'requiring the debtor to pay the judgment debt in accordance with the terms of the judgment' within s 4 sub-s (1)(g) of the Bankruptcy Act 1883 and is consequently not a good foundation for a receiving order.
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[32] However, Cozens-Hardy MR, who was also in the panel of the case cited in the preceding paragraph, explained the position in *Re A Debtor (No 1838 of 1911)* [1912] 1 KB 53. This was where a French firm had obtained a final judgment against the debtor, who resided in England, and had served upon him a bankruptcy notice requiring him to pay the amount due on the judgment to the creditors or one or either of them carrying on business at the address of the firm in Paris. It was held that the notice was bad, for it required the debtor to pay the judgment debt without the jurisdiction of the court and was therefore not 'in accordance with the terms of the judgment' under s 4, sub-s (1)(g) of the Bankruptcy Act 1883. He said:

The solicitors had no implied authority of course to receive money for their clients, and the fact that the solicitors made a demand under the notice, 'I tell you I have a power of attorney, please pay me,' was not in our view a compliance with the Act. The judgment required payment to the plaintiffs, and it was not in compliance with the Act for the notice to require payment to the plaintiffs, or their solicitors, who certified, without any other proof, that they had authority to receive it. But so far from deciding that a notice to pay the plaintiffs in the action following the form of the judgment would not be sufficient if payment was directed to be at a particular address where there was an authorized agent to receive it, I think the contrary was in terms asserted. I say, on p 723, 'Payment to any member of the firm would be a good discharge, it being a firm debt.' But why would it be a good discharge? Simply because according to the general law, now statutory law, under the Partnership Act, each partner is an agent for the firm, and therefore by ordering payment to the firm at a particular address, one member of the firm being there, he is competent to receive the money and to give a discharge as agent for, and so to bind, the firm. Not only is that so, but the very point raised here was decided by this court in March of this year in the case of *Re Persse* 55 Sol J 314. In *Re Persse* the petitioning creditor was a house master at Winchester. Persse owed him some money. Judgment was obtained. The house master had two addresses, his house at Winchester, and a cottage where he was to be found in the vacation. He only gave the Winchester address in the notice. He was not at the Winchester address during the seven days, but it was proved that he had his butler there, who had authority during that time to receive the amount payable by the defendant, the judgment debtor, to him, and the Court of Appeal there held that that was a good compliance with the statute. It really seems to me it would not be open to us, having regard to the decision in *In re Persse*, to accept the proposition which has been strenuously argued before us by the respondents to this case, that payment to an agent is not payment to the principal within the meaning of this section.

I think, therefore, no difficulty whatever need arise in the case of foreign creditors. They have only to say, in the words of the bankruptcy notice, 'Pay me the proper amount at some address in London,' and to have at that address a duly constituted and proper agent duly authorised to receive payment on behalf of the plaintiff. I only mention that because it is quite obvious that the recent decision in *Re a Debtor* [1911] 2 KB 718 has been misunderstood. In my opinion this appeal must be allowed on the first point and with the usual consequences.

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A [33] With the same view, Fletcher Moulton LJ said:

I fully agree also with the Master of the Rolls that it is important for us to take notice of the decision in *Re a Debtor* and explain it, because it has clearly been misunderstood. In my opinion that decision did not intend in any way to interfere with what had already been laid down by this court, namely, that it is sufficient that at the address given there should be an agent properly authorised to receive payment of the money and to give a discharge for the debt. That had been laid down in *Re Persse*, and I am certain there never was any intention on the part of this court to depart from that decision. The objection to the bankruptcy notice in the case of *Re a Debtor* was that in one part of it the debtor was directed to pay to the solicitors of the judgment creditors, not to the judgment creditors themselves, and there was an assurance on the bankruptcy notice, signed by the solicitors, to the effect that they had authority to receive. Nothing more than that was before the court, and in my opinion the court was quite justified in saying that it was not a proper bankruptcy notice. But I think that if the bankruptcy notice had said 'Pay me at Ms Spyer & Son's,' and Ms Spyer & Son possessed a power of attorney entitling them to receive the money for the judgment creditors, the decision would probably have been the other way. The decision turned entirely on the special facts of that case, and it was not intended to throw any doubt whatever on the power of the judgment creditor to arrange that the receipt of the debt shall be by a properly authorized agent at the address given. For these reasons I think this appeal must be allowed with the usual consequences.

E [34] Similarly, Farwell LJ concluded his judgment in the following manner:

Then the second point urged was that we are bound by the recent decision in *Re A Debtor*. In my opinion that case decides simply this, and I am taking the last sentence of the judgment of the Master of the Rolls: 'This is a matter which is technical beyond almost anything else in the proceedings at the present day, and the question is whether a bankruptcy notice can be right which departs so far from the authorised form and from the judgment itself as to say 'pay over to me or to a gentleman who says he is my solicitor.' I can find no foundation for the argument that that was a decision that a creditor cannot demand payment to his duly authorised agent. The natural course for the foreign creditor to take is to direct the debtor to pay to him at the office of the person who is authorised to receive it, and when the debtor attends there to pay, he will be met by the duly authorised agent of the creditor, who will produce his power of attorney. It seems to me perfectly simple. It was decided, on an extreme technicality, that the notice in *Re A Debtor* was bad, but that case does not lay down any general rule. I therefore agree that this appeal should succeed.

H [35] As for the accord and satisfaction, learned counsel for the respondent questioned why the payment by the respondent was accepted if there was no settlement and no subsequent withdrawal of proceedings. By receiving the money and still proceeding with the matter, he argued, it was an act of oppression. Bankruptcy, he added, should be final step and not the first move.

I He said as the money being held in favour by the official assignee was only from the date the petition to oppose was filed, the facts postulated in the second question did not arise.

[36] In reply, learned counsel for the appellant reiterated that matters raised by learned counsel for the respondent were not raised at earlier levels and it was unfair to the appellant.

[37] In *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337, the question of law for the decision of the Federal Court was: 'What sort of dispute is envisaged by s 9(1A) of the Act? Must it be a dispute between employer and employee only?' At the hearing, however, the submissions advanced by the parties were not confined to the threshold jurisdiction point but were wide ranging and raised question of law and fact along the same lines as those advanced in the courts below. In particular, counsel for the respondent argued that in arriving at his decision, the minister had acted irrationally and illegally and in excess of jurisdiction by failing to take into consideration various relevant factors both of law and fact enumerated in the affidavit by the general secretary of the Association of Bank Officers, Peninsular Malaysia (hereinafter 'ABOM').

[38] It was held that as a matter of principle, there could be no jurisdiction whatsoever for depriving a respondent to an appeal of his general right to take any point open to him in order to hold his judgment. Thus, it was open to ABOM to raise points outside the scope of the issue in respect of which leave to appeal had been given in order to hold their judgment following *Thomas v Marconi's Telegraph Co Ltd* [1965] 2 All ER 598 and distinguishing the facts in *Sababumi (Sandakan) Sdn Bhd v Dato Yap Pak Leong* [1998] 3 MLJ 151. Furthermore, notwithstanding *Sababumi*, having regard to r 47(4), and 57(1) and (2) of the Rules of the Federal Court 1995, the Federal Court has the power and therefore the discretion to permit an appellant to argue a ground which falls outside the scope of the questions regarding which leave to appeal had been granted in order to avoid a miscarriage of justice.

[39] In view of the motion, therefore, it is my finding that learned counsel for the respondent should not be shut out from raising ancillary issues which we consequently gave our due consideration.

[40] The question of directing the payment to the appellant's solicitors, as can be seen from the authorities cited, is a non-issue. Having scrutinised the relevant orders, I would that say the 92% alleged by learned counsel for the respondent is actually the result of the superimposition of the figures for nine and a half per cent, which is the agreed interest rate.

[41] As for the issue of accord and satisfaction, as stated earlier, I see no reason to disagree with the finding by the High Court that there was none despite the persistent claims of the respondent. It was always the respondent paying a certain sum of money to the appellant and asking that it be treated as a final settlement sum which was never agreed to by the appellant. Continuing with the bankruptcy proceedings despite the payments cannot, therefore, be held to be an act of oppression on the part of the appellant. The second question must therefore be answered in the negative.

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A [42] In these circumstances, I would dismiss the motion with no order as to costs and allow the appeal with costs here and below and make the necessary receiving and adjudication orders against the respondent. The deposit is refunded to the appellant. All monies paid by the respondent to the appellant are to be paid to the official assignee within two weeks of this order.

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Abdul Hamid Mohamad FCJ:

C [43] The petitioning creditor (appellant in this court) had petitioned the judgment debtor (respondent in this court) for bankruptcy alleging that the respondent was truly indebted to them for a sum of RM5,513,468.61. The senior assistant registrar dismissed the petition with costs. Appeal to the judge-in-chambers was also dismissed with costs. Appeal to the Court of Appeal was also dismissed with a slight variation to the judge's order. On 7 July 2003 this court granted leave to the appellant for the determination of two issues:

D (a) Whether for the purpose of interpretation of the provisions of the second limb to s 6(3) of the limitation Act 1953 the date when interest became due under a judgment is to be taken as the date of judgment, or the date of commencement of interest as stipulated in the judgment;

E (b) Whether acceptance of part payment by a judgment creditor in the course of bankruptcy proceedings renders the proceedings an abuse of process despite indication by the judgment creditor that such payments would be paid over to the official assignee in the event the debtor is adjudicated bankrupt upon the creditor's petition by reason of the absence of full settlement of the judgment debt.

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G [44] About two weeks before the date fixed for the hearing of this appeal, the respondent filed a notice of motion for an order that the appeal be struck out or be stayed permanently mainly on the ground of multiplicity of proceedings. This is because, subsequent to the filing of the bankruptcy proceedings from which this appeal arises, the appellant had filed another bankruptcy notice allegedly based on the same judgment. We decided to hear the appeal because, on my part, the respondent had in fact applied for an order to strike out the second bankruptcy notice and an order had been made by the senior assistant registrar to that effect. The appellant had appealed to the judge-in-chambers against that order and the appeal is still pending. The second proceedings, in my view, does not in any way affect the hearing and disposal of this appeal. Indeed, the disposal of this appeal will determine the fate of the second proceedings. This is because, if the decision favours the appellant, the second proceeding becomes superfluous. In any event, as it stands, the second proceedings stands struck out. This appeal concerns the first proceedings. If there is an abuse of process of the court on the ground put forward in the notice of motion, it is the second proceedings, not the first.

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[45] Coming back to this appeal, to appreciate the discussion on the two issues, I shall briefly narrate the facts.

[46] The appellant obtained a judgment against the respondent on 19 November 1987. The judgment, as amended, reads:

IT IS THIS DAY ADJUDGED that the defendant (respondent in this court — added) to pay the plaintiffs (the appellant in this court — added) the sum of US1,755,000 (United States Dollars One Million seven hundred and fifty five thousand) together with interest thereon at the rate of nine and a half per cent per annum from 22 March 1986 to the date of realisation and \$350 (Ringgit Three hundred and fifty) costs.

[47] On 4 January 1992, the bankruptcy notice was issued. The particulars of indebtedness show an outstanding principal sum of RM4,403,295 derived from the judgment order. As regards the interest due on the principal sum, it was calculated from 22 March 1986 as stated in the judgment. There were payments made by the respondent from time to time towards the judgment debt which were duly noted in the particulars.

[48] The respondent did not pay the sum demanded in the bankruptcy notice within the stipulated 7 days ie 12 November 1992, but, on 18 November 1992 the respondent made a part payment of RM126,700 to the appellant. On 16 February 1993 the appellant presented a creditor's petition against the respondent for failure to comply with the bankruptcy notice. The creditor's petition claimed a sum of RM5,513,465.61 being the amount outstanding as at 15 December 1992, after deducting the part-payment of RM126,700.

[49] On 11 November 1993, the respondent made a further part-payment of RM504,816.20 (equivalent to US\$200,000) to the appellant.

[50] The respondent then filed a notice of intention to oppose petition dated 23 May 1994. The sole ground relied on by the respondent was that there had been a complete accord and satisfaction of the debt owed to appellant by his payment of RM504,816.20 (equivalent to US \$200,000) on 11 November 1993.

[51] The appellant denied that there was accord and satisfaction of the debt. The appellant further indicated that the appellant would hand over to the official assignee all monies on which the act of bankruptcy was committed.

FIRST QUESTION

[52] On the first question, the High Court held that interest claimed in the bankruptcy notice was time-barred as the total period for which interest was claimed exceeded six years. This is because the interest had been calculated from the date of commencement of interest as stipulated in the judgment ie from 22 June 1986. The Court of Appeal, in dismissing the appeal, did not expressly decide on this point. The appeal was dismissed on the second issue only.

- A** [53] Before us, learned counsel for the appellant referred us to this court's judgment in *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2002] 2 MLJ 385 and submitted that as the bankruptcy notice was issued within six years from the date of the judgment, the interest claimed was not time-barred even though it included pre-judgment interest. In other words, the material
- B** date is the date of the judgment, not the date of commencement of interest. So long as the bankruptcy notice is filed within six years from the date of the judgment, the appellant is entitled to claim interest as stipulated in the judgment even though the date of the commencement of the interest was earlier.

- C** [54] The judgment of this court in *United Malayan Banking Corp Bhd* was delivered on 5 April 2002, more than a year before leave was granted in this case. In that case on 15 October 1987, the appellant had obtained summary judgment against the respondent for RM95,864.93 on an overdraft account together with interest at 15% pa thereon with monthly rests from 1 April 1986
- D** until full realisation, and for RM66,051.74 on overdue trust receipt account together with interest at 16% pa thereon until full settlement, and RM350 costs. On 24 January 1996, eight years and three months after the date of judgment, the appellant filed a bankruptcy notice against the judgment debtor amounting to RM229,563.68 including accrued interest thereon.

- E** [55] Abdul Malek Ahmad FCJ, delivering the judgment of the court, said, at p 397 of the report:

- F** The Court of Appeal had decided that 'the date on which the interest became due' was the date of the breach which would be before the judgment date. We are of the considered view that this finding is erroneous as the arrears of interest are in respect of a judgment debt, which as we have stated earlier is the principal sum and the prejudgment interest, and so the date on which the interest on the judgment debt became due must surely mean the judgment date.

- G** [56] Thus, it is clear that this court has, in *United Malayan Banking Corp Bhd* case decided that 'the date on which the interest became due' is the judgment date. That is the answer to the first question. In this judgment I shall not say anything more about the other points decided in that case.

SECOND QUESTION

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- I** [57] Regarding the second question, it is not disputed that US\$200,000 (RM504,816.20) was paid by the respondent and accepted by the appellant and that the appellant undertook to pay it over to the official assignee. What was disputed was whether it was paid and received as a complete accord and satisfaction of the debt. Indeed that was the only ground for opposing the petition as contained in the affidavit of the respondent filed on the same date as the notice of intention to oppose the petition, ie 23 May 1994.

The learned High Court judge held:

... no agreement was ever reached between the debtor and the petitioning creditors to treat the payment of US\$200,000 as a full and final settlement of the judgment debt. The debtor's offer was never accepted by the petitioning creditors prior to the debtor making the payment of US\$200,000 ...

[58] In the Court of Appeal, learned counsel for the appellant complained that the learned High Court judge found for the respondent on the point without sufficient investigation of facts. That argument found favour with the Court of Appeal. That part of the judgment reads:

The appellants complain that the learned judge found for the respondent on the point without sufficient investigation of facts. I think there is much force in this argument. There may or may not have been an accord and satisfaction as alleged by the respondent. It is an issue that called for resolution in other proceedings properly brought by the respondent. The judge ought not, in my view, have expressed any concluded view on this issue in the absence of cogent evidence.

[59] However, whether the payment of US\$200,000 is or is not a complete accord and satisfaction of the debt is not the issue in this court. The issue is whether the receipt of the payment by the appellant (which is not denied) amounts to an abuse of the bankruptcy jurisdiction of the High Court or, what is usually called 'abuse of the process of the court'. It must also be pointed out that the question, as posed to this court is not whether acceptance of part-payment nullifies the bankruptcy notice and/or petition. However, as decisions on this last-mentioned point are only at High Court level, perhaps I should take this opportunity to clarify the law.

[60] In *Re Patel (A debtor)* [1986] 1 All ER 522, it was held that where a debt on which the bankruptcy petition was founded had by the date of the hearing of the petition been reduced by part-payment to less than the statutory minimum the court had no jurisdiction to make a receiving order. That is a very sensible judgment, because, if the debt at the time of making the receiving order, is less than the statutory minimum, then the bankruptcy court clearly has no jurisdiction to make the receiving orders. But, where the debt is above the statutory minimum, the court's jurisdiction is not ousted.

[61] Malaysian courts have, on many occasions, followed *Re Patel* and took a similar view, ie where after the filing of the creditor's petition the amount owing by the debtor is reduced, the petition is not bad as long as the amount remaining owing at the date of hearing of the petition is more than the statutory limit. See *Re Chong Ah Kwan Construction Co* [1966] 2 MLJ 39; *Re Loh Kok Huah* [1992] 1 MLJ 687; *Re Ti Hock Soon* [1993] 1 CLJ 477; *Re Sharifah Mohsin* [1994] 3 CLJ 373; *Re Fong Yuan Kwong* [1996] 4 MLJ 42; *Re Darshan Singh a/l Atma Singh, ex p OCBC Bank (Malaysia) Bhd* [1996] MLJU 1195; *Rozila bte Mohamed v American Express (M) Sdn Bhd* [1999] MLJU 959; *Dalam Perkara Hussain bin Manaf, ex p Malayan Banking Bhd* [2001] MLJU 781; *Re MSA Zachariah, ex p Boon Siew Finance Bhd* [1993] 3 CLJ 279.

- A** [62] I am also aware of the judgment of High Court, Ipoh (Azmi J, as then was) in *Re Saloma Co; ex p Ipoh Radio Co* [1963] MLJ 46. In that case the judgment debtor sought to set aside a bankruptcy notice which had been served on him by way of substituted service. The service was deemed to take effect on 29 May 1962. However, on 12 May 1962 the judgment debtor had paid RM700 towards the judgment debt. The court held that the bankruptcy notice was defective.

- C** [63] In my view, that case is clearly distinguishable from the other cases mentioned earlier. It was an application to set aside the bankruptcy notice. Clearly, the amount stated in the bankruptcy was incorrect as the payment of RM700 had not been taken into account. Furthermore, from the judgment, we do not know how much the balance was. It could well be below the statutory minimum.

- D** [64] In any event I prefer the view that have been followed by the courts in this country, following *Re Patel*.

[65] On the question of abuse of the process of the court, this is what the Court of Appeal says:

- E** However, in the state of the evidence before him, the learned judge would have been perfectly entitled to dismiss the petition on the ground that it was an abuse of process. The appellant's own evidence warranted this. It is clear that the appellant had accepted payments from the respondent after commencing bankruptcy proceedings. The totality of the circumstances reasonably supports the inference that the appellant was using the bankruptcy court to extract payments from the respondent. That in my judgment amounts to an abuse of the bankruptcy jurisdiction of the High Court.
- F** The bankruptcy jurisdiction of the High Court is invoked on the ground that a debtor has committed an act of bankruptcy. The object of the exercise is to take the debtors financial affairs out of his hands and place them in the hands of the official assignee. It is certainly an abuse of process to use bankruptcy proceedings in the way of a judgment debtor summons to extract periodical payments from the debtor.

- G** [66] In considering the question of abuse of the process of court in bankruptcy proceedings, we must not lose sight of the reality in a debt recovery action. The intention of a creditor is to recover the debt. Towards that end, he files his claim and obtains judgment. Obtaining a judgment is not the end of the matter. A judgment is worthless if the debt is not recovered. So, the law provides ways to realise the judgment by way of execution proceedings. If the judgment debtor has assets, usually the judgment debtor would adopt one of the methods of execution proceedings. But, where the debtor, being an individual, has no assets, the judgment debtor, usually as a last resort, would commence bankruptcy proceedings. It is only a natural process provided by law. When law provides various means of realising a judgment debt, the fact that a judgment debtor prefers one method over the others is within his legal right. Any judgment creditor would prefer to choose the most effective way of realising the judgment debt. That again is sensible. So, strong evidence of *mala fide* on the part of judgment

creditor is required to prove abuse of process of court in bankruptcy proceedings. In this respect, perhaps it is easier to prove abuse of process of court in winding-up proceedings, in particular where no judgment has been obtained, the amount is small, the company is in a sound financial position, than in bankruptcy proceedings based on a judgment.

[67] With that opening observation, let us look at the law in the context of bankruptcy proceedings.

[68] *Halsbury's Laws of England* (4th Ed, Vo 3(2)) para 185, under the heading of 'Abuse of process' says:

Where a petition is founded on a debt to which the petitioning creditor is not properly entitled, it may be dismissed as an abuse of process. This includes the situation where the presentation of a petition amounts to an attempt by the petitioning creditor, through the commencement of bankruptcy proceedings, to obtain the payment of money or other advantage to which he is not properly entitled. Such conduct on the part of the creditor is sometimes termed as 'extortion'.

[69] In *Re A debtor (No 757 of 1954), The Editor v RA Damont Ltd* [1955] 2 All ER 65 (CA), it was held:

- (a) there is no hard and fast rule that any arrangement or agreement made by a petitioning creditor with his debtor, after the institution or under the shadow of bankruptcy proceedings, whereby the creditor is able to get more than that 'to which he was legally entitled' (that is, more than he could have recovered at law at the time of the bankruptcy proceedings being started or threatened) amounts to extortion in bankruptcy law, notwithstanding the absence of any *mala fides* or anything amounting to oppression in fact.
- (b) There is equally no rule that extortion has, in bankruptcy law, a special and artificial significance divorced altogether from the ordinary implication of the word.
- (c) The so-called 'rule' in bankruptcy is no more than an application of a more general rule that court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and, therefore, disqualified from invoking the powers of the court by proceedings which he had abused.
- (d) On the other hand the court will always look strictly at the conduct of a creditor using or threatening bankruptcy proceedings; and, if the court concludes that the creditor has used or threatened the proceedings at all oppressively (for example in order to obtain some payment or promise from the debtor or some other collateral advantage to himself properly attributable to the use of the threat), the court will not hesitate to declare the creditor's conduct extortionate and will not allow him to make use of the process which he has abused.

- A** (c) In every case it is a question of fact in all the circumstances of the case whether there has been, in truth, extortion.

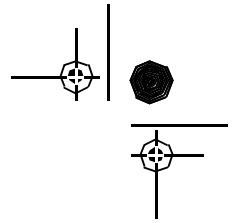
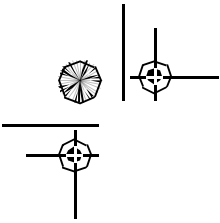
[70] A good summary of the law on the issue is to be found in the judgment of the High Court of Australia in *Rosenbes & Ors v Kronhill & Anor* (1956) 95 CLR 407 at p 417. Citing *Re Majory* [1955] Ch 600 which was also reported as *Re A Debtor*, the judgment went on to say:

- B** There is an abuse of process if a pending bankruptcy petition, or a threat of proceedings in bankruptcy, is used as a means of extortion. The word 'extortion' is not a technical term, and it has in bankruptcy law 'no special and artificial significance divorced altogether from the ordinary implication of the word'. The court will look strictly at the conduct of a creditor using or threatening bankruptcy proceedings, and extortion may be held to have taken place if the creditor has used, or attempted to use, a pending petition, or a threat of a petition; in order to extract from the debtor money which the debtor is not bound to pay, or in order to obtain some secret and unfair advantage over other creditors. But extortion will not be held to have taken place 'in the absence of *mala fides* or anything amounting to oppression in fact'. There must be a real intention on the part of the creditor to use the process for some other end than its legitimate end, and there must be a real exertion of pressure.
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- D**

- [71]** In the instant appeal, the only factor relied on by the respondent was that the appellant had accepted the payment of US\$200,000 by the respondent. Even that payment, which the appellant insisted was a part-payment was made after the bankruptcy proceedings, was commenced. There is no allegation that the appellant was using the bankruptcy proceedings as a means of obtaining payment of money to which the appellant was not entitled to or any evidence of fraud. As mentioned earlier, the only ground put up by the respondent to oppose the petition was that there was an accord and satisfaction. The bankruptcy proceedings were filed by the appellant, as a judgment debtor, to recover the judgment debt owed to them. The fact that the respondent made the payment subsequent to the filing of the bankruptcy proceedings does not in any way tarnish the intention of the appellant in commencing the proceedings or even pursuing it as the appellant was of the view that it was only a part-payment of the judgment debt. Furthermore, the issue of abuse of process of the court was not raised by respondent in the High Court.
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- [72]** So, my answer to the second question is in the negative. Merely accepting payments in the course of bankruptcy proceedings does *not* render the proceedings an abuse of process, what more when the money is to be paid to the official assignee in the event the debtor is adjudicated bankrupt.
- H**

- [73]** For the reasons above-stated, I would allow the appeal with costs. The order of the Court of Appeal dated 20 July 1999 is set aside. As only those two issues are before this court and, in my judgment, I have answered them both in favour of the appellant, I would make a receiving and adjudicating order against the respondent. The deposit is to be returned to the appellant. The sum of RM504,816.20 (equivalent to US\$200,000) paid by the respondent
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to the appellant and the interests earned thereon is to be paid to the official assignee within two weeks of this order.

Appeal allowed.

Reported by Lim Lee Na

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